IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.5 OF 2005

Narayan Shankar More (Gosavi) ...Appellant

Vs.

Smt.Nanda Genba Dalvi ...Respondent

Mr.S.J.Rairkar for the Appellant
Mr.S.N.Chandrachood for the Respondent.

CORAM: A.S.OKA,J.
DATE : FEBRUARY 10, 2005.

P.C.:

1. The hearing of the Appeal was completed on the last date

and today it is kept for dictation of the Judgment.

2. The Appeal is by the original Defendant. A suit was filed by the Respondent for declaration and perpetual injunction. The Appellant is the real brother of the Respondent. The case of the Respondent is that the suit property was originally owned by the father of the parties and the Respondent purchased the suit property by a registered sale deed dated 11th January 1994 executed by the father. The case of the Respondent is that she is not residing in the vicinity of the suit property and taking undue advantage of the said fact the Appellant tried to trespass on the suit property. It is stated that the Appellant has dug up ditches and six pillars have been erected on the suit property. Therefore, a suit for declaration and injunction was required to be filed. The defence of the Appellant is that the sale deed was got executed from the father at the age of 96 years. It is

contended that there was an old farm house on the suit property which was in dilapidated condition and with a view to repair the same the Appellant started R.C.C. construction.

3. The Courts below have accepted the case of the Respondent and have come to the conclusion that the Respondent was the exclusive owner of the suit property and that she was in possession of the suit property. The case of the Appellant that the suit property continues to be the joint family property was disbelieved by the Courts below. The Trial Court passed a decree of declaration that the Respondent was the owner of the suit property and the Appellant has no right, title or interest in the suit property. While granting perpetual injunction in favour of the Respondent, the Appellant was restrained from disturbing possession by trespassing or unlawfully carrying out any construction through himself or through his agents. The learned Trial Judge also directed the Appellant to remove the construction of pillars made on the suit property.

4. The learned Counsel for the Appellant submitted that the suit filed by the Respondent was not for possession. He submitted that the Appellate Court has recorded a finding that the Respondent was not in possession. He, therefore, submitted that the suit itself was not maintainable in absence of prayer for possession. In any event, he submitted that the trial Court could not have directed the Appellant to remove the construction on the suit plot when the suit was not filed for possession.

5. The learned Counsel for the Respondent invited my attention to the prayers made in the plaint. He pointed out that in the prayer for prohibitory perpetual injunction a prayer was made for removal of construction, if any, made by the Appellant on the suit property. He submitted that merely because at one point of time the Appellant erected six pillars on the suit property, it cannot be construed that the Respondent was dispossessed and the Appellant was in possession of the suit property. He invited my attention to the findings recorded by the Courts below and he submitted that no interference is called for.

6. I have considered the rival submissions. After considering the evidence on record the Courts below have held that the sale deed executed in favour of the Respondent has been duly proved. In fact, the Appellate Court has held that the execution of the sale deed by the father was not disputed by the Appellant.

7. While dealing with the contention raised by the Appellant that the suit property continued to be the joint family property, the Appellate Court has referred to the documentary evidence on record. The Appellate Court has recorded a finding that an application was made by the Appellant, his brothers and his deceased father to the Tahsildar at Exh.65 which reveals that there was a partition effected and a request was made to the Tahsildar to give effect to the said partition in the revenue record. Certified copy of the statements made before the Revenue Authority by the Appellant,

his brothers and his deceased father were produced on record and were admitted in evidence.

8. Once it is found that there was a prior partition in which the suit property came to the share of the father and once it is found that the execution of the sale deed by the father was admitted, it is obvious that the Respondent is the exclusive owner of the suit property.

9. The area of the suit property is 22 gunthas. All that the Trial Court has held is that the by illegally entering into the property, the Appellant has erected six pillars. There is no finding recorded by the Trial Court or the Appellate Court that the Appellant is in possession. Mere stray acts of entry on the part of the Appellant are not sufficient to come to the conclusion that the Appellant is in possession of the suit property. Moreover, the Respondent is held to be lawful owner by the Courts below. As there was a specific prayer for removal of construction erected by the Appellant on the suit property, no fault can be found with the direction given by the Trial Court against the Appellant for removal of the construction of pillars.

10. In view of the concurrent findings of fact recorded by the Courts below, no substantial question of law arises.

Second Appeal is dismissed with no order as to costs.

JUDGE.